Kyros International Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-01–16 OF 2010

B

LINTON ALBERT, MOHTARUDIN BAKI JJCA AND HAMID SULTAN J

10 JANUARY 2013

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Revenue Law — Income tax — Appeal against assessment — Franchise fees received by appellant from foreign franchisees — Whether franchise fees were in respect of activities that took place outside Malaysia — Whether SCIT had erred in finding that franchise fees were exempt from tax – Whether finding warranted appellate interference — Whether respondent had rightly exercised its discretion to impose penalty against appellant

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The appellant, a kebab fast food chain operator, was the registered owner of the KYROS trademark ('the trademark'). The appellant entered into franchise agreements with certain foreign entities ('foreign franchisees'), whereby it granted the franchisees sole and exclusive right to the trademark as well as its operating system. The appellant argued that the franchise fee, which it received from its foreign franchisees was income that was exempt from tax, whereas the respondent was of the view that the fees received by the appellant franchisor were not based on its operation outside Malaysia and thus were assessable to income tax. The Special Commissioners of Income Tax ('SCIT') found as a fact that the foreign franchise activities took place outside Malaysia and therefore held that the franchise fees received from the foreign franchisees was exempt from tax under para 28(1) Schedule 6 of the Income Tax Act 1967 ('the Act'). The SCIT also held that there should be no penalty imposed by the respondent against the appellant. The respondent appealed to the High Court on the grounds that the SCIT had misdirected itself in concluding that the operation of the appellant was outside Malaysia on the basis that the operations of the foreign franchisees were outside Malaysia. The High Court judge allowed the respondent's appeal with regard to the first issue but dismissed the second issue as to the imposition of a penalty. This was the appellant's appeal against the High Court's decision and the respondent's cross-appeal against that part of the High Court's decision to dismiss the imposition of a penalty against the appellant. The appellant submitted that the High Court judge's finding that the franchise fee was not derived from outside Malaysia was an error of law. On the issue of penalty, the appellant maintained that the franchise fee was shown in the taxpayer's computation and that there was no 'hiding' of any income.

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Held, allowing the appellant's appeal with costs of RM10,000 and dismissing the respondent's cross-appeal:

(1) It is well-settled that the appellate court generally recognised the special position of the SCIT and that the burden would lie with the respondent DGIR to satisfy the court that appellate interference was necessary. In fact, the appellate court could only disturb the finding of fact in limited circumstances. Further, in the Malaysian context the SCIT, which was appointed under s 98 of the Act, was expected to be specialised in the scope of the adjudication process it was entrusted with under the Act. There was much merit in the appellant's submission that the facts found by the SCIT could not be assailed by the High Court. On the factual matrix of the instant case the finding of facts of the SCIT did not warrant appellate interference (see paras 14(i)–(j) & (l)–(n)).

(2) On the issue of penalty, the High Court judge was right to sustain the decision of the SCIT and there was no necessity to dwell on the legal reasoning behind this decision (see para 15).

[Bahasa Malaysia summary

Perayu, pengendali rantaian makanan segera kebab, adalah pemilik berdaftar cap dagangan KYROS ('cap dagangan'). Perayu memasuki perjanjian francais dengan entiti asing tertentu ('francais asing'), di mana ia diberikan satu-satunya francais dan hak eksklusif kepada cap dagangan dan juga sistem operasinya. Perayu berhujah bahawa fi francais, yang mana diterima daripada francais asing tersebut adalah pendapatan yang dikecualikan daripada cukai, sebaliknya responden berpendapat bahawa fi yang diterima oleh perayu pemberi francais bukan berdasarkan atas operasinya di luar Malaysia dan oleh itu adalah cukai pendapatan boleh taksir. Pesuruhjaya Khas Cukai Pendapatan ('SKCP') mendapati secara fakta bahawa aktiviti-aktiviti francais asing berlaku di luar Malaysia dan oleh itu memutuskan bahawa fi francais dikecualikan daripada cukai di bawah perenggan 28(1) Jadual 6 Akta Cukai Pendapatan 1967 ('Akta'). SKCP juga memutuskan bahawa tidak patut terdapat penalti dikenakan oleh responden terhadap perayu. Responden merayu kepada Mahkamah Tinggi berdasarkan bahawa SKCP telah tersalah arah dirinya dalam memutuskan bahawa operasi perayu adalah di luar Malaysia berdasarkan bahawa operasi-operasi francais asing adalah di luar Malaysia. Hakim Mahkamah Tinggi membenarkan rayuan responden berkaitan isu pertama tetapi menolak isu kedua terhadap pengenaan penalti tersebut. Ini adalah rayuan perayu terhadap keputusan Mahkamah Tinggi dan rayuan balas responden terhadap bahagian keputusan Mahkamah Tinggi tersebut kerana menolak pengenaan penalti terhadap perayu. Perayu berhujah bahawa dapatan hakim Mahkamah Tinggi yang francais fi bukan berasal daripada luar Malaysia adalah kesilapan undang-undang. Atas isu penalti, perayu mengekalkan

bahawa fi francais ditunjukkan dalam pengiraan pembayar cukai dan tidak terdapat 'hiding' mengenai apa-apa pendapatan.

Diputuskan, membenarkan rayuan perayu dengan kos RM10,000 dan menolak rayuan balas responden:

(1) Adalah undang-undang nyata bahawa mahkamah rayuan secara am menerima kedudukan khas SKCP dan bahawa beban akan ditanggung oleh responden KPHD untuk membuktikan kepada mahkamah bahawa campur tangan mahkamah rayuan adalah perlu. Sebenarnya, mahkamah rayuan hanya boleh campur tangan keputusan fakta dalam keadaan yang terhad. Selanjutnya dalam konteks Malaysia SKCP, yang dilantik di bawah s 98 Akta, sepatutnya mengkhusus dalam skop proses pengadilan seperti yang diamanahkan di bawah Akta tersebut. Terdapat merit yang banyak dalam hujahan perayu bahawa fakta yang didapati oleh SKCP tidak dapat diatasi oleh Mahkamah Tinggi. Atas fakta matrik kes ini dapatan fakta SCKP tidak mewajarkan campur tangan mahkamah rayuan (lihat perenggan 14(i)–(j) & (l)–(n)).

(2) Atas isu penalti, hakim Mahkamah Tinggi betul dalam mengekalkan keputusan SKCP dan tidak perlu untuk memikirkan mengenai alasan-alasan undang-undang di sebalik keputusan ini (lihat perenggan 15).]

Notes

For cases on appeal against assessment, see 10 *Mallal's Digest* (4th Ed, 2011 Reissue) paras 2376–2377.

Cases referred to

Commissioner of Inland Revenue v Hang Seng Ltd [1990] STC 733, PC (refd)

Ch Pte Ltd v Comptroller of Income Tax (1988) 1 MSTC 7022 (refd)

Chua Lip Kong v Director-General of Inland Revenue [1982] 1 MLJ 235, PC (refd)

Clarke v Edinburgh Tramways Co [1919] SC 35, HL (refd)

Coghlan v Cumberland [1898] 1 Ch 704, CA (refd)

Colgate Palmolive (M) Sdn Bhd v Yap Kok Foong and another appeal [2001] 4 MLJ 97, CA (refd)

Commissioner of Inland Revenue (NZ) v NV Philips' Gloeilampenfabrieken [1955] NZLR 868, SC (refd)

Commissioner of Inland Revenue v Orion Caribbean Ltd (in vol liq) [1997] STC 923, PC (refd)

Director-General of Inland Revenue v Hypergrowth Sdn Bhd [2008] 1 MLJ 417; [2008] 4 CLJ 250, HC (refd)

Edwards (Inspector of Taxes) v Bairstow & Anor [1955] 3 All ER 48; 36 TC 207, HL (refd)

A *Ganthokoru Mangamma and Others v Dulla Paidayya and others* AIR 1941 Madras 393 (refd)
Hari Shankar v Rao Girdhari Lal Chowdury AIR 1963 SC 698, SC (refd)
Hemantha Kumari Debi v Jagindra Nath Roy Bahadun 10 CWN 630 (refd)
Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97,
B CA (refd)
Ngee Tai Shipping Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2007] 6 CLJ 724, HC (refd)
Office Park Development Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2011] 9 MLJ 479, HC (refd)
C *Watt (or Thomas) v Thomas* [1947] AC 484, HL (refd)
Yarrows v Frowde Ltd [1934] 3 DLR 711, CA (refd)

Legislation referred to

Courts Judicature Act 1964 ss 29, 69
D Income Tax Act 196 ss 3, 12, 12(1)(a), 98, 113(2), para 28(1) Schedule 6
Penal Code s 21

Appeal from: Suit No R22–14–15 of 2011 (High Court, Kuala Lumpur)

E *Arjunan Subramaniam (Shanker & Arjunan) for the appellant.*
Abu Tariq Jamaluddin (Marina Ibrahim with him) (Deputy Revenue Solicitors & Revenue Counsel) for the respondent.

Hamid Sultan J (delivering judgment of the court):

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[1] This is our judgment in respect of the appellant's appeal and the respondent's cross-appeal. We heard both the appeals on 5 December 2012 and allowed the appellant's appeal and dismissed the respondent's cross-appeal with costs to the appellant. My learned brothers, Datuk Linton Albert and Datuk
G Wira Mohtarudin bin Baki, have read the judgment in draft form and approved the same.

[2] The appeal revolves on a complaint of the appellant that the learned High
H Court judge interfered in the finding of facts of the Special Commissioners of Income Tax ('SCIT') and to drive home the point relies on the case of *Chua Lip Kong v Director-General of Inland Revenue* [1982] 1 MLJ 235 where the Privy Council in no uncompromising terms held:

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> Their Lordships cannot stress too strongly how important it is that, in every case stated for the opinion of the High Court, the Special Commissioners should state clearly and explicitly what are the findings of fact upon which their decision is based and not the evidence upon which those findings, so far as they consist of primary facts, are founded. Findings of primary facts by the Special Commissioners are unassailable. They can be neither overruled nor supplemented by the High Court

itself; *occasionally they may be insufficient to enable the High Court to decide the question of law sought to be raised by the case stated, but in that event it will be necessary for the case to be remitted to the Commissioners themselves for further findings*. (Emphasis added.)

[3] At this stage of our judgment itself, we must say that courts exercising the appellate jurisdiction have over the years placed upon themselves various levels of self-imposed restrictions for appellate interference on the finding of facts of trial courts or tribunal, or statutory appeal by case stated as in the instant case (see *Colgate Palmolive (M) Sdn Bhd v Yap Kok Foong and another appeal* [2001] 4 MLJ 97). It must also be noted that the scope of appellate interference may be further restricted depending on the nature of the appeal as the jurisdiction relating to appeal, revision, review, reference etc, and the jurisprudence relating to such 'heads' are not one and the same (see *Hari Shankar v Rao Girdhari Lal Chowdury* AIR 1963 698, SC).

[4] When dealing with appellate interference on finding of facts, it is important to appreciate that the Evidence Act 1950 categorises facts into two types. They are physical fact and psychological fact. Physical facts under the Act refer to anything, state of thing, or relations of thing capable of being perceived by the senses. Psychological facts refer to any mental condition of which any person is conscious of.

[5] As a general rule finding of facts of trier of facts is rarely disturbed by appellate court more so when it relates to physical facts. As long as the trier of facts has directed his mind to the relevant issues, and had acted in accordance with the law and the decision passes the test of reasonableness, the finding of facts relating to physical facts will not be ordinarily disturbed notwithstanding the judgment is brief and direct to the point. However, when it relates to psychological facts the trier of facts is expected to give more cogent reasons to ensure every aspect of the relevant evidence has been considered in the right perspective to pass the test of reasonableness, (see *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97). Failure to give sufficient reasons in the grounds of judgment may result in appellate interference. This is evident from decided criminal cases and very seldom in civil cases as psychological facts may not be relevant unless it is a probate matter, consisting of issues such as *animus testandi*, undue influence or fraud etc or in civil cases relating to conspiracy or motive etc. When it relates to statutory appeals concerning SCIT the test for appellate interference is much stricter (see *Edwards (Inspector of Taxes) v Bairstow & Anor* [1955] 3 All ER 48; 36 TC 207).

BRIEF FACTS

[6] The SCIT unanimously allowed the appellant's appeal before them on

the following issues, namely (a) whether or not the following payments (overseas) received under the franchise agreement entered by the appellant with foreign entities are exempted under para 28 Schedule 6 of the Income Tax Act 1967 ('ITA 1967'); and (b) whether the penalty imposed under s 113(2) of the ITA 1967 is correct in law.

[7] The respondent succeeded before the High Court on the first issue but failed on the second, and hence the cross-appeal before the Court of Appeal by the respondent. The learned High Court judge had given some consideration to the issues in the grounds of judgment and, inter alia, had stated:

> [36] As found by the SCIT the imposition of penalty by the Revenue Department was on the ground of failure of the taxpayer to make or give accurate returns and information. It was found by SCIT also that there was no non-disclosure of information on the accounts in the book of the taxpayer. The taxpayer had also given full disclosure during audit. The SCIT made its finding through witness RW1, that the taxpayer had not been recalcitrant, and 'had not made incorrect returns for all the tax years under appeal'.
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> [37] It is clear that under s 113(2) of the ITA the discretion to impose penalty or otherwise is solely at the discretion of Revenue Department. In view of the fact that 'franchise fee' is not given specific treatment under ITA at this point in time, neither is there any guideline or direction issued by the appellant on the same, in my view this is an appropriate situation for the KPHDN to exercise his discretion in favour of the taxpayer. In the circumstances of the present facts, the appeal of the KHDN on this issue should be dismissed.

[8] Learned counsel for the appellant's submission can be summarised as follows:

(a) the law to be considered for the purpose of appeal is ss 3, 12 and para 28 Schedule 6 of the ITA 1967;

(i) s 3 reads as follows:

> Section 3. Charge of income tax
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> Subject to and in accordance with this Act, a tax to be known as income tax shall be charged for each year of assessment upon the income of any person accruing in or derived from Malaysia or received in Malaysia from outside Malaysia.

(ii) para 28 Schedule 6 reads as follows:

SCHEDULE 6: Exemption from tax

28. (1) Income of any person, other than a resident company carrying on the business of banking, insurance or sea or air transport, for the basis year for a year of assessment derived from sources outside Malaysia and received in Malaysia.

(iii) s 12 (1)(a) reads as follows:

12. Derivation of business income in certain cases.

(1) Where for the purposes of this Act it is necessary to ascertain any gross income of a person derived from Malaysian from a business of his, then —

(a) Subject to subsection (2), so much of the gross income from the business as is not attributable to operations of the business carried on outside Malaysia shall be deemed to be derived from Malaysia;

(iv) the appellant established a substantial reputation and goodwill in the business of operating *kebab* fast food chain;

(v) the appellant is the registered owner of the trade mark, KYROS;

(vi) the appellant granted the sole and exclusive right to the franchisee to establish and operate in a designated area;

(vii) the appellant asserts the right granted has two distinct aspects namely the proprietary trade mark, KYROS, and the operating system of the appellant;

(viii) the appellant supports the franchisee in the operations by giving the following services audit on the operating system to ensure compliance with the standard operating procedure and giving advice to the franchisee on ways to improve operations and business development;

(ix) in order to achieve the services in (viii) above, the appellant send staff;

(x) the SCIT found that the franchise fees received from Pakistan, China, Indonesia, Singapore, and Brunei are exempt under para 28(1) Schedule 6 of the ITA 1967;

(xi) the SCIT held:

We find as a fact the execution or operations of business by the foreign franchisees took place outside Malaysia, through the evidence of the Respondent's witness (RW1). The foreign franchisees are independent i.e. not related to the Appellant. We therefore hold that all activities in respect of the agreements entered into with the foreign entities took place outside Malaysia.

(xii) the learned judge recognised that the SCIT found as a fact that the foreign franchise took place outside Malaysia. This is how the learned judge put it:

> The SCIT in the case stated at para 4 on p 19 found that the 'execution or operation of business by foreign franchisees took place outside Malaysia' through the evidence of RW1. Relying on this evidence the SCIT made a finding that the activities in respect of the agreement entered into between the foreign entities (Franchisee) took place outside Malaysia. Accordingly the SCIT held that the franchise fees received from the foreign Franchisees are income received 'from the place where the properly was let …' as enunciated in the case of *Commissioner of Inland Revenue v Hang Seng Bank Ltd* [1990] STC 733. For this reason the SCIT hold that all the activities in respect of the franchise agreement is akin to the phrase 'by letting property' as stated in Hang Seng' Bank Ltd.

(xiii) the learned judge is therefore, in error of law in holding that the franchise fee was not given or derived from outside Malaysia viz:

> However as have alluded to earlier the franchise fees in question do not include exploitation of trade mark because they are only confined to provision of services by the Franchisor.

(xiv) the finding of fact that the franchise was given outside of Malaysia is for the SCIT to decide;

(xv) the learned judge is in error of law to hold that the SCIT is not supported by evidence because the ledgers, exh D, support the SCIT's findings;

(xvi) the learned SCIT found as a fact that the granting of rights was overseas. It follows that para 28 Schedule 6 exemption applies and also s 12(1)(a) of the ITA 1967 applies and correctly applied by the SCIT; and

(xvii) the income is derived where the franchise was exercised and relies on the case of *Commissioner of Inland Revenue v Hang Seng Ltd* [1990] STC 733 where it was stated:

> profit will have arisen in or derived from the place where the property was let, the money was lent.

And relies on a number of cases, which support the proposition that income is earned where the operation on the granting of rights take place. The cases are as follows (a) *Commissioner of Inland Revenue (NZ) v NV Philips' Gloeilampenfabrieken* [1955] NZLR 868; (b) *Ch Pte Ltd v Comptroller of Income Tax* (1988) 1 MSTC 7022; and (c) *Commissioner of Inland Revenue v Orion Caribbean Ltd (in vol liq)* [1997] STC 923.

[9] And the appellant says that the case of *Orion Caribbean Ltd* supports the appellant's case ie trademarks exploited overseas is derived overseas, 'other things being equal'.

[10] On the issue of penalty, the appellant says that franchise fee was shown in taxpayer's computation and therefore, there was no 'hiding' of any income.

[11] Learned counsel for the appellant on the issue of penalty relies on the case of *Office Park Development Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2011] 9 MLJ 479, where the High Court held that:

> (4) The Special Commissioners were correct in their finding that the appellant's incorrect return was made in good faith and that the penalty imposed by the respondent in respect of the same should be waived. The respondent's contention that s 113(2) of the Act did not provide the defence of good faith was without basis. The penalty provisions in ss 113(1) and 113(2) of the Act are to punish taxpayers who deliberately submit incorrect tax returns and information and it was not the intention of Parliament to punish innocent taxpayers. Further, it was not mandatory for the respondent to impose a penalty in all tax audits.

[12] The court in that case also relied on the Canadian Court of Appeal's decision in *Yarrows v Frowde Ltd* [1934] 3 DLR 711 and observed:

> [51] It is worth noting that the Canadian Court of Appeal in *Yarrows v Frowde Ltd* [1934] 3 DLR 711 held that 'a penalty is a sum of money of which the law exacts payment by way of punishment for doing some act that is prohibited or omitted to do some act that is required to be done. The term involves the idea of punishment, either corporal of pecuniary …'. The penalty provision in ss 113(1) and 113(2) is to punish taxpayers who deliberately submit incorrect tax return and information. It cannot be the intention of Parliament to punish taxpayers who innocently submit incorrect tax returns or those taxpayers who engage professional tax agents to prepare and submit their tax returns.
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> [52] Further it is not mandatory for the respondent to impose penalty in all tax audits. I agree that the fact that the respondent has a discretion amplifies the appellant's submission that a penalty should not be imposed in this case as the appellant had acted in good faith and made full disclosure of information.

[13] The submission of learned counsel for the respondent can be summarised as follows:

(a) the reliance placed by the SCIT on the fact that the franchisees operate the business outside Malaysia and concluding that the franchisor's operation took place outside Malaysia is an error;

(b) the proper consideration before the SCIT should be whether the franchise owned, services and advice provided by the franchisor which is the subject matter of the agreement between parties, are indeed an operation outside Malaysia by the franchisor. There is no evidence to support a finding that the fees received, by the franchisor is based on its operation outside Malaysia. The SCIT's finding pertaining to this was made without any evidence and therefore it is an error;

(c) the SCIT had misdirected itself in concluding that the operation of the franchisor was outside Malaysia on the basis that the operations of the franchisees were outside Malaysia; and

(d) the learned High Court judge had dismissed the respondent's appeal on the imposition of penalty on the appellant based on the following reasons:

(i) in the circumstances of the present case, it is noted that 'franchise fee' is not clearly stipulated in the ITA 1967;

(ii) there is no guideline issued by the respondent on the same;

(iii) there was no non-disclosure of information on the accounts in the book of the appellant. The appellant had also given full disclosure during audit; and

(iv) the discretion to impose penalty or otherwise is solely at the discretion of respondent. In view of the fact that the 'franchise fee' is neither given specific treatment under the Act at this point in time, nor is there any guideline or direction issued by the respondent on the same, this is an appropriate situation for the respondent to exercise his discretion in favour of the appellant.

[14] We have read the appeal record, the relevant memorandum of appeal and the detailed submission of the parties. We are grateful to learned counsels for the comprehensive submission on law and facts. It will serve no useful purpose to repeat the same save to deal with the core issues. After having given much consideration to the submission of learned counsel for the respondent, we take the view that the appellants' appeal must be allowed and the respondents' cross-appeal must be dismissed. Our reasons, inter alia, are as follows:

(a) it has been well settled by long line of authorities that the finding of facts by a trial judge or tribunal or it's like must be given utmost respect and interference on finding of facts is only exercised in limited circumstances. The House of Lords in *Watt (or Thomas) v Thomas* [1947] AC 484, after having gone through all leading authorities on the subject matter, has held that:

> When a question of fact has been tried by a judge without a jury and it is not suggested that he has misdirected himself in law, an appellate court in reviewing the record of the evidence should attach the greatest weight to his opinion, because he saw and heard the witnesses, and should not disturb his judgment unless it is plainly unsound. The appellate court is, however, free to reverse his conclusions if the grounds given by him therefor are unsatisfactory by reason of material inconsistencies or inaccuracies or if it appears unmistakably from the evidence that in reaching them he had not taken proper advantage of having seen and heard the witnesses or has failed to appreciate the weight and bearing of circumstances admitted or proved.

(b) His Lordship, Justice Gopal Sri Ram sitting in the Court of Appeal has dealt with this area of jurisprudence in more than ten reported cases mostly related to physical facts. The most often repeated quote of His Lordship was that of Lord Shaw of Dunfermline's speech in *Clarke v Edinburgh & District Tramways Co* [1919] SC 35 (HL), where His Lordship said:

> When a judge hears and sees witnesses and makes a conclusion or inference with regard to what on balance is the weight of their evidence, that judgment is entitled to great respect, and that quite irrespective of whether the judge makes any observations with regard to credibility or not. I can of course quite understand a Court of Appeal that says that it will not interfere in a case in which the judge has announced as part of his judgment that he believes one set of witnesses, having seen them and heard them, and does not believe another. But that is not the ordinary case of a cause in a court of justice. In courts of justice in the ordinary case things are much more evenly divided; witnesses without any conscious bias towards a conclusion may have in their demeanour, in their manner, in their hesitation, in the nuance of their expressions, in even the turns of the eyelid, left an impression upon the man who saw and heard them which can never be reproduced in the printed page. What in such circumstances, thus psychologically put, is the duty of an appellate court? In my opinion, the duty of an appellate court in those circumstances is for each judge of it to put to himself, as I now do in this case, the question, Am I — who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the judge who heard and tried the case — in a position, not having those privileges, to come to a clear conclusion that the judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment.

(c) the test is much stricter when it relates to psychological facts as opposed to finding of physical facts as alluded in the Court of Appeal's decision in *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97 which relates to probate. His Lordship, Justice Gopal Sri Ram sitting in the Court of Appeal went to elaborate what amounts to judicial appreciation of evidence. The Court of Appeal held:

> (2) Generally, an appellate court will not intervene unless the trial court was shown to be plainly wrong in arriving at its decision or where there had been no or insufficient judicial appreciation of the evidence. Judicial appreciation of evidence meant that a judge who was required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. He must, when deciding whether to accept or to reject the evidence of a witness, test it against relevant criteria. Thus, he must take into account the presence or absence of any motive that a witness may have in giving his evidence. Where contemporary documents existed, he must test the oral evidence of a witness against these. He must also test the evidence of a particular witness against the probabilities of the case. The principle central to appellate interference is that a decision arrived at by a trial court without judicial appreciation of the evidence may be set aside on appeal.

(d) when it relates to physical facts much reliance is placed on the trier of facts on the decision per se rather than failure to capture every aspect of the evidence in the judgment (see *Clarke*'s case). However, when it relates to psychological facts cogent reasons must be given, failing which it may attract appellate interference (see *Lee Ing Chin*'s case);

(e) the distinction in relation to physical facts and that of psychological facts is like apple and orange. A court exercising appellate jurisdiction which relies on *Lee Ing Chin* test expressly and/or impliedly in relation to physical facts must be seen as perverse and not according to law;

(f) it is also well settled that appeal is a rehearing of a case (see ss 29 and 69 of the Courts Judicature Act 1964 ('CJA 1964')). However, when a court sits in its appellate jurisdiction and interferes in the finding of facts of a trier of facts there is a duty and obligation to meticulously go through the pleadings, witnesses' evidence, notes of proceedings and very importantly, the memorandum of appeal in full, and provide grounds of judgment. In *Coghlan v Cumberland* [1898] 1 Ch 704, the Court of Appeal stated that:

> Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case, and the court must reconsider the materials before the judge with such other materials as it may have decided to admit. The court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the court comes to the conclusion that the judgment is wrong.

(g) in such a case, three things must appear from the judgment of the court exercising its appellate jurisdiction. They are as follows (i) the court has applied its mind to reasons given by the trier of facts; (ii) the court's cognisance that the trier of facts had the advantage of seeing and hearing the witnesses the benefit of which the appellate court do not have; (iii) the

court must give cogent reasons for disagreeing with trier of facts. There are a number of cases to support the proposition that no doubt an appellate court has undoubted jurisdiction to reconsider the oral evidence and reach a finding contrary to that arrived by the trial court or trier of facts (as the case may be) but this it can do only if the grounds of its judgment satisfied the three conditions stated above (see *BN Bannerjee's Law of Civil Appeals and Revisions,* (4th Ed), (1994), p 723);

(h) it is not permissible for court exercising appellate jurisdiction to extract abstract statements from the submission of the parties without going through a process of full rehearing as advocated in the Court of Judicature Act 1964, and stating in the grounds that, there was 'insufficient judicial appreciation' or the judge or tribunal 'fell into error' etc. Such judgments may stand to be contrary to law. In *Ganthokoru Mangamma and Others v Dulla Paidayya and others* AIR 1941 Madras 393, the court relying on the judicial committee's decision of *Hemantha Kumari Debi v Jagindra Nath Roy Bahadun* 10 CWN 630 stated:

> In other, words, this is a case to which the observations of Their Lordships of the judicial committee in 16 MLJ 272 at p 274 would apply, namely that the judgment in appeal does not come to close quarters with the judgment which it reviews and indeed never discusses or alludes to the reasoning of the trial judge. In such a case Their Lordships observed that this characteristic of the appellate court's judgment 'seriously invalidates its authority'.

(i) where the decision of the Special Commissioner is appealed to the High Court by way of case stated, the burden lies on the appellant (ie the Inland Revenue) to satisfy the court that the Special Commissioner's decision was based on the misconception of the law or their conclusion cannot be supported by the primary facts, and that conclusion on the mixed facts and law in this case was such that no reasonable Special Commissioners could have reached it if they had correctly directed themselves (see *Director-General of Inland Revenue v Hypergrowth Sdn Bhd* [2008] 1 MLJ 417; [2008] 4 CLJ 250). The test is much stricter for appellate interference in contrast to *Clarke*'s case or *Lee Ing Chin*'s case;

(j) it is well settled that the appellate court generally recognises the special position of the Special Commissioners. The appellate court can only disturb the finding of fact in a limited circumstance. In *Edwards (Inspector of Taxes) v Bairstow & Anor* [1955] 3 All ER 48; 36 TC 207, the High Court and the Court of Appeal asserted that the question whether or not the transaction was an adventure in the nature of trade is one purely of fact and that finding by Special Commissioners cannot be disturbed on appeal. However, the House of Lords in that case created limited exception to this principle. Lord Viscount Simonds opined:

> Before, however, examining the authorities in any detail, I would make it clear that in my opinion, whatever test is adopted, that is whether the finding that the transaction was not an adventure in the nature of trade is to be regarded as a pure finding of fact or as the determination of a question of law or of mixed law and fact, the same result is reached in this case. The determination cannot stand: this appeal must be allowed and the assessments must be confirmed. For it is universally conceded that, though it is a pure finding of fact, it may be set aside on grounds which have been stated in various ways but are, I think, fairly summarised by saying that the court should take that course if it appears that the Commissioners have acted without any evidence or upon a view of the facts which could not reasonably be entertained.

(k) in the same case Lord Radcliffe stated:

> I think it possible that the English Courts have been led to be rather overready to treat these questions as 'pure questions of act' by some observations of Warrington and Atkin, LJJ, in *Cooper v Stubbs* 10 TC 29 If so, I would say, with very great respect, that I think it a pity that such a tendency should persist. As I see it, the reason why the courts do not interfere with Commissioners' findings or determinations when they really do involve nothing but questions of fact is not any supposed advantage in the Commissioners of greater experience in matters of business or any other matters. The reason is simply that by the system that has been set up the Commissioners are the first tribunal to try an appeal and in the interests of the efficient administration of justice their decisions can only be upset on appeal if they have been positively wrong in law. The court is not a second opinion, where there is reasonable ground for the first. But there is no reason to make a mystery about the subjects that Commissioners deal with or to invite the courts to impose any exceptional restraints upon themselves because they are dealing with cases that arise out of facts found by Commissioners. Their duty is no more than to examine those facts with a decent respect for the tribunal appealed from, and, if they think that the only reasonable conclusion on the facts found is inconsistent with the determination come to, to say so without more ado.

(l) in the Malaysian context it must not be forgotten that Special Commissioners are appointed under s 98 of the ITA 1967 and are expected to be specialised in the scope of the adjudication process they are entrusted with under the Act (see *Ngee Tai Shipping Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2007] 6 CLJ 724). That section reads as follows:

> Section 98. The Special Commissioners and the Clerk
>
> (1) For the purposes of this Act there shall be three or more Special Commissioners of Income Tax and a Clerk to the Special Commissioners.

(2) The Special Commissioners shall be appointed by the Yang di-Pertuan Agong.

(3) The Special Commissioners shall include such number of persons with judicial or other legal experience (that is to say, experience as an advocate, as a member of the judicial and legal service or as the holder of an office to which the Judges Remuneration Act 1971 [Act 45], applies) as may be necessary for the purposes of paragraph 1 of Schedule 5; and, if the Yang di-Pertuan Agong considers it expedient to do so, he may appoint from amongst those persons a Chairman and such number of Deputy Chairman of the Special Commissioners.

(4) Each Special Commissioner —

(a) shall hold office for such period and on such terms (including terms as to remuneration and allowances) as may be specified by the Minister; and

(b) shall be deemed to be a public servant within the meaning of section 21 of the Penal Code [Act 574].

(5) The office of the Clerk shall be a federal public office.

(m) there is much merit in the appellant submission that facts found by Special Commissioners cannot be assailed by the High Court. And if the High Court attempts to do so it necessarily must take cognisance of the strict test laid down by the Privy Council in *Chua Lip Kong* which referred to the case of *Edwards v Bairstow*. And the grounds of judgment must deal with the three criteria stated above for the judgment to be sustained; and

(n) on the factual matrix of the instant case, we are in total agreement with the submission of the learned counsel for the appellant that the finding of facts of the Special Commissioners does not warrant appellate interference by the High Court.

[15] On the issue of penalty, we take the view that the learned judge was right to sustain the decision of the Special Commissioners though we do not think it is necessary to dwell on the legal reasoning behind the said decision.

[16] For reasons stated above, the appeal is allowed. The cross-appeal is dismissed. The SCIT's decision is reinstated. The respondent to pay the appellant costs in the sum of RM10,000. The appellant to pay allocatur before the extraction of order for costs. Deposit to be refunded.

[17] We hereby order so.

Appellant's appeal allowed with costs of RM10,000 and respondent's cross-appeal dismissed.

Reported by Kohila Nesan